IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Criminal Appeal. No. 346-SB of 1998

Date of Decision: May 22, 2007

Ilyas & others

...Appellants

VERSUS

State of Haryana

...Respondent

Criminal Appeal. No. 360-SB of 1998

Date of Decision: May 22, 2007

Jaicum & another

...Appellants

VERSUS

State of Haryana

...Respondent

CORAM: HON'BLE MR.JUSTICE RANJIT SINGH

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporters or not?
3. Whether the judgment should be reported in the Digest?

Present: Mr.S.S.Narula , Advocate,
for the appellants.

Mr.S.K.Hooda, Sr.DAG, Haryana.

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RANJIT SINGH J.

Through this order, the above-mentioned two connected appeals are being disposed of together. The facts are being taken from Criminal Appeal. No. 346-SB of 1998.

Appellants, Ilyas, Suledin, Kamal and Barkat are convicted for offences under Sections 363, 366, 376 and 344 IPC read with Section 34 IPC. All four are sentenced to suffer R.I. for 10 years under Section 376 IPC with fine of Rs.4,000/-; sentence of 3 years and 4 years respectively under Sections 363 and 366 IPC with fine of Rs. 3000/- and 2500/- each and 1 ½ years R.I. with fine of Rs.1,000/- under Section 344 IPC. Jaicum and Juhruddin, appellants in Criminal Appeal No.360-SB of 1998, are convicted for offences under Sections 363 and 366 IPC and are directed to undergo R.I. for 3 and 4 years. under the respective offences coupled with fine of Rs.2,000/- and 2,500/- respectively.

The facts in brief, as revealed from the prosecution story, are that Taj Mohammad resident of village Dihana, submitted a written complaint alleging that his 15 years old daughter Subhani was kidnapped on 18.4.1994 when she had gone to jungle for fetching fodder. At the time of the incident, she was accompanied by some other girls including her sister Farmina. The complainant named all the above six appellants in his written complaint as the persons responsible for abducting his daughter, Subhani. Four of the

appellants were from village Dihana whereas appellants Suledin and Illays belonged to village Babupur. It was further disclosed that daughter of the complainant had been put in a car in which Rozdar and Juhruddin were already sitting. Farmina, the second daughter of the complainant had statedly raised alarm and all the girls had also attempted to save Subhani from being kidnapped but they were threatened with gun. The complainant also mentioned that his daughter was kidnapped for doing a wrong act by the abductors. The case under Sections 366, 376 and 506 IPC was accordingly registered. Investigation was set in motion. On 16.5.1994, Subhani was recovered by A.S.I. Phool Singh and her statement under Section 164 Cr.P.C. was recorded before the Magistrate. Due to absence of a lady doctor in civil hospital, her medical examination could only be conducted on 17.5.1994. Prosecutrix, in her statement, made an allegation of gang rape by appellants Ilayas, Suledin, Barkat and Kamal. They were accordingly arrested on 16.6.1994. Appellant Juhruddin and Jaicum were arrested by the police on 17.6.1994. The gun was recovered from them, which was taken in possession. Since the prosecutrix had not named Sube Khan, Rohsan, Risalu, Alisher, Ruddar and Asru, they were kept in collumn No.2 in the challan, which was submitted before the Court. A consolidated charge was framed against all the appellants under Sections 363, 366, 506 and 34 IPC. A separate charge was framed against Suledin, Ilyas, Barkat and Kamal under Sections 344 and 376 IPC read with Section 34.

The appellants, when confronted with incriminating

evidence and material, pleaded false implication. In his statement appellant Ilyas said that he is innocent and had not committed any act of rape on Subhani who, according to him, was married to his brother Alisher. In fact, Suledin, Ilyas and Alisher are three brothers and Kamal and Barkat are their nephews being sons of their brother. As per Ilyas, Taj Mohd.-complainant, is a dishonest person and wanted to sell his daughter Subhani to some person by getting her back from the company of her husband Alisher. He claimed that complainant-Taj Mohd. in collusion with the police has foisted this false case against the appellants with aim to get back his daughter. It is alleged that the appellants Jaicum and Jahuruddin were named to take revenge as they had enmity with the complainant. It is further the case of appellants that prosecutrix Subhani has been sold by her father to a person in village Pipake-Patti Sehsola and has given birth to a child. It is also brought out that the prosecutrix had earlier given birth to a son from the loins of Alisher. Her age is stated to be more than 22 years. Blaming the investigating agency, the appellants submit that entire investigation of this case was false and tainted. The other appellants also adopted the same line of defence in their separate statements made before the Court. The appellants examined eight witnesses in their defence and produced on record documents like ration card, copy of birth certificate and voter list in support of their defence case. The trial court after appreciating the evidence, of the respective parties, convicted the appellants, as already noticed and sentenced them to suffer various terms of R.I. as referred to above. The appellants have accordingly filed these appeals.

I have heard counsel for the parties.

Counsel, appearing for the appellants, submit that the prosecution story, as projected, is highly doubtful and that the prosecution could not prove its case beyond reasonable doubt, in view of various infirmities in the evidence of the prosecution. As per the counsel, defence is able to establish its case even much beyond the preponderance of probabilities. The counsel maintains that the story, as projected, by the defence, if, found worthy of credence, on the basis of probabilities, would cast doubt on the case of the prosecution entitling the appellants to the benefit of doubt and earn them an acquittal. He would further say that the trial Court failed to appreciate the case from its proper perspective as per the legal concept. The counsel points out that the FIR, in this case, was lodged with the delay of four days, it being dated 21.4.1994, whereas the incident is of dated 18.4.1994. It is accordingly urged that this FIR was lodged after due deliberation and is not a spontaneous account of events. A grievance also is made that some of the persons named by the complainant were left out without any explanation, whereas, names of two of the appellants Kamal and Barkat were introduced later by the prosecution. It is also highlighted that important witnesses like Farmina and girls, in whose presence the prosecutrix was abducted, were not examined and this would entitle the defence to plead that an adverse inference be drawn against the prosecution on this count. Continuing further, the counsel says that the case set up by the defence, on the other hand, stands fully established. DW1 is a Molvi, who had proved marriage of the prosecutrix with Alisher. Entries in the voter list and the ration

card are also placed on record, in support of this marriage.

I have considered the rival contention raised before me. The case of the prosecution is mainly supported by the evidence of Taj Mohd. PW1, who is the complainant and his daughter Subhani, who is the prosecutrix. No doubt, PW1 Taj Mohd. has given evidence in support of the complaint filed by him but it is seen that his knowledge about the incident of kidnapping of his daughter is a derivative one. Concededly, he was not present at the scene when abduction took place and has lodged this complaint on the basis of information provided to him by his other daughter Farmina. His version and his evidence would, as such, be hearsay evidence. Farmina was not examined by the prosecution as a witness. Thus the complainant evidence is totally hearsay which would not have even been recorded. On the other hand, defence appears to be justified in urging that an adverse inference be drawn against the prosecution for withholding Farmina. Illustration (g) under Section 114 of Indian Evidence Act does provide that the Court may presume that the evidence which could be and is not produced would, if produced, be unfavorable to the person who withholds it. No reason or explanation is forth coming for not examining Farmina as witness. It can thus be presumed that the evidence of Farmina would have been unfavorable to the prosecution if she was produced and for that reason she has been withheld from the Court. The evidence of the complainant, as such, can not be of much help to the prosecution. PW1 was otherwise cross-examined in detail on the aspect of prosecutrix being married to Alisher. He, however, denied that his daughter was married to Alisher or that she had given birth to a son

out of this wedlock. PW1, conceded that prosecutrix was later married at Village Pipake-Patti Sehsola four years back. The witness was, however, unable to recollect the name of his son-in-law. It would rather sound strange to notice that PW1 was unable to tell name of his son-in-law. This may support the allegation that he had sold his daughter to him. When questioned that his daughter had filed complaint against him, the witness denied the same. He had to concede that his daughter was shown as wife of Alisher in the voter list but denied if she had given birth to a son from this marriage. The complainant admitted that appellant Suledin, Ilyas and Barkat were married but denied if he knew about the relationship between Barkat and Suleman with Suledin and Ilyas. While being cross-examined by the counsel of appellant Ilyas, PW1 denied the suggestion that he had forcibly abducted her daughter from village Babupur where she was living as wife of Alisher. When his attention was drawn to the fact that Alisher had filed a private complaint on 23.4.1994 in the Court of Magistrate, Palwal, PW1 expressed his ignorance about the same. PW1 further denied the suggestion that the present report was lodged by him when he could not succeed in getting his daughter back from Alisher forceably. The prosecution has relied on the statement of prosecutrix Subhani (PW2). She has supported the case of prosecution by saying that she was forcibly put into car by Jaicum and Jhurudin with the help of others. As per PW2, they, had not accompanied the other persons in the car. She has further testified that appellants Suledin, Barkat, Kamal and Ilyas had taken her to village Babupur and kept there for six days. She has also made allegation of forcible intercourse and the fact that she was kept

in jungle for 20 days where she was allegedly raped by the said four persons. While under cross-examination, PW2 denied that she was married to Alisher or that her name was appearing in the voter list or ration card. Though she claimed that she is married three-four years ago but strangely was unable to tell the name of her husband. How a wife would not know the name of her husband would be a mystery? This would certainly cast doubt on veracity of her version. Still strange would it be to notice that later while under cross-examination she was able to recollect the name of her husband to be Kamal Khan. Initially she stated that she is married to son of Kamru. In her statement, recorded under Section 164 Cr.P.C., she had not mentioned the name of her husband to be Kamal Khan. She claimed that she was married about 3-4 months before the date of her kidnapping but had never remained with her husband at Pipake-Patti. As per PW-2, she had gone to this village after 3-4 days of her recovery by the police. This may fit in tune with the defence story that she has been sold by her father. She denied the suggestion that her father had made attempt to kidnap her at Palwal, regarding which she had lodged a report. She also denied, if she had filed any complaint in the Court at Palwal in this regard. Though she stated that she was kept in a house at village Babupur but she could not disclose as to whose house this was. She further deposed that nothing was given to her to eat during these six days of her captivity and she was given beating and had shown injuries to the doctor in this regard. Talking about the manner of her recovery, she stated that she was recovered by the police but she was not able to tell the number of police persons who had recovered her.

Having regard to the nature of evidence, as aforementioned, it is required to be seen if the version of prosecutrix PW2 would be safe to convict the appellants for the offences alleged against them. It cannot be denied that appellants Jaicum and Jahurudin belonging to the village of the complainant. They have been named as the one, who along with others had put the prosecutrix into a car. No other role is attributed to them. Jaicum, of course is even not named in the FIR. There is an evidence of enmity between the complainant and appellants jaicum and Jahurudin. As already noticed, the evidence of PW1 complainant is of no avail to the prosecution as he is not in any position to give any first hand account of happenings. His evidence basically is a hearsay evidence. Though the prosecutrix had named Jaicum and Jahurudin as the one who helped others in putting her in a car, yet this fact could received corroboration if Farmina and Sakarbi were examined, who were given up by the prosecution as unnecessary. How could these important eye-witnesses be given up in this manner when complainant has given evidence on being told by them. In this background, it is to be seen as to how much reliance can be placed on the version of PW2, in this regard. Her version is required to be assessed in the light of various infirmities pointed out by the defence. The prosecution case though is supported by the evidence of the prosecutrix herself but her evidence is countered by a totally divergent case set up by the defence and the same is supported by various independent witnesses like Molvi, who performed marriage of the prosecutrix with Alisher, ration card

indicating her to be wife of Alisher, voter list, showing her to be wife of said Alisher. In this background, her evidence would need to be scrutinised with care and caution. It is to be seen if her version is worthy of an implicit reliance being the sole testimony to sustain the conviction of the appellants. Her evidence is not only contrary to other evidence on record but would not find support from the medical evidence led by the prosecution. Dr. Vandana Narula (Pw3) found no mark of injury around her genitalia. This aspect would belie and would stand in contradiction to the deposition of the prosecutrix that she was subjected to gang rape for number of days by four persons. While answering a specific question, doctor-PW3 stated that tenderness, congestion and raw areas are generally noticed immediately after the commission of rape. As per PW3 even some bleeding points are also seen which may not be there if the victim is examined after one month of commission of offence. PW3 then opined that she cannot say if it was a gang rape case or not and further that there was no finding of recent sexual act. Clarifying the word 'recent' she testified that it would mean three to four days. PW3 otherwise could not remember if the prosecutrix had given history of having been sexually assaulted by one person or by a gang of persons. The witness stated in clear terms that if the prosecutrix had given her history of she being subjected to gang rape the same was bound to be mentioned by her. PW3 also brought out that she would have mentioned the injury if she had noticed these on any part of body of the prosecutrix. Having said so, PW3 opined that she could say that the prosecutrix was not raped for three to four days prior to the date of examination. In reply to another Court

question she said "even if no resistence is offered by the victim even then there can be findings after 3-4 days of gang rape". Thus it would be seen that version of the prosecutrix does not find any support from the medical evidence and rather is contradicted by the medical evidence given by an independent doctor.

Contrary to this, the defence would point out to the evidence of Molvi Mohd., who testified that he had conducted the Nikah of Alisher with the prosecutrix, daughter of Taj Mohd. (complainant). Alisher was also examined as defence witness and he deposed in clear manner that he was married to the prosecutrix Subhani and she had lived with him as a wife for a period of two years. Even the complainant was statedly present at this marriage. He also disclosed that Suledin and Ilyas are his real brothers and Barkat and Kamaludin are his nephews. He has brought on record the ration card, voter list where prosecutrix was shown as his wife. As per his evidence, the prosecutrix had even voted during the elections of Gram Sabha and Haryana Assembly in the year 1995. The witness also deposed about the male child having born out of this wedlock which had died. Defence produced Rai bhan (DW3), who was a witness to the marriage between Alisher and Subhani. He also deposed about the incident where complainant along with others had given injuries to Jahurudin and Subekhan to indicate that appellant Jaicum and Jahurudin had been falsely named in this case because of this enmity. DW3 also testified that prosecutrix has now been given to a person at village Pipake-Patti Sehsola. Ravi Kant, DW4 proved the ration card containing name of the prosecutrix as wife of Alisher. DW6 proved the entry of birth of prosecutrix in the

village registered to be 16.1.1975. Asruddin DW7 was examined to prove on record that he was attacked by Israil and others and had lodged a report in this regard with police. This evidence was basically to prove the enmity of the complainant with two of the appellants. On the basis of this evidence, led by the defence, it is pleaded that defence was able to establish its case which would show that prosecutrix had married Alisher, whereas complainant Taj Mohd. wanted to sell her and with that aim even made an attempt to take her from the custody of Alisher. The defence claims that it is to obtain the custody of prosecutrix that this false case was lodged against the appellants, who are brothers and nephews of Alisher to whom she was married. It is stated that apellants Jaicum and Jahurudin were involved because of their enmity with the complainant. Learned counsel for the appellants submits that more than four persons, who had allegedly taken the prosecutrix in a car, would not need any support from some other persons, to put her into the car. In this background and in the background that this concededly is a case of enmity between appellants Jaicum and Jahurudin with the complainant, the chance of their false implication cannot be ruled out. The complainant was admittedly not present at the time of incident and other witnesses, from whom he derived this knowledge, were given up. Evidence of the complainant is thus total hearsay. In order to succeed, the prosecution has to show and prove its case beyond shadow of any reasonable doubt whereas defence would succeed by only showing its case on preponderance of probabilities. If reasonably probable and evenly balanced views of the evidence are possible then one may have to concede the

existence of a reasonable doubt. The Courts have held that to entitle an accused person to the benefit of doubt arising from the possible view in favour of the accused, it must be as nearly reasonably probable as that against him. I need not to reiterate the well settled principal of law that reasonable doubt does not mean some light, airy, unsubstantiated doubt that may flit through minds at some times or the other. It does not mean a doubt arising out of sympathy and reluctance to convict. It means a real doubt, a doubt founded on reasons. Thus tested, it can be said that this is a case where preponderance of probabilities are one way only. It is also in a case where a real possibility of another view is there. The story advanced by the prosecution is full of gaps and the one projected by the defence sounds reasonable and certainly probable. Reference can be made to **Pandurang Sitaram Bhagwat v. State of Maharashtra 2005(1) RCR 858 and Rameshwar and others v. State of Rajasthan 2005(2) RCR 956.** In Pandurang's case (supra) the Hon'ble Supreme Court has held that the approach of the Court that a lady would not ' put her character at stake' may not be wrong but cannot be applied universally. Each case has to be determined on the touch stone of the factual nature thereof . It is not unusual to find cases falsely advanced for an offence under Section 376 IPC. In case of Rameshwar (Supra), the accused were acquitted of the charge of gang rape when the evidence did not show any injury on the private parts, thigh, buttocks, chest and back, and absence of injuries would not be possible in a case of forceable intercourse for number of nights etc.

Having considered the entire evidence and the case, I am of the view that the prosecution has not succeeded in proving the case beyond the shadow of reasonable doubt. It is un-safe to base conviction in this case only on the sole basis of the testimony of the prosecutrix which suffers from various infirmities as noticed above. It is not prudent to place implicit reliance on the testimony of the prosecution as it is found suffering from basic infirmities and is not supported by any evidence or material. On the other hand, the defence case as projected sounds reasonably probable and, as such, would go to cast doubt on the prosecution story. It would further lead to an inference that case of the prosecution is not proved beyond reasonable doubt. Accordingly the conviction of the appellants and the sentence awarded to them cannot be sustained. Both the appeals, as such, are allowed. The conviction and sentence awarded to the appellants is set aside. The bail bonds would stand discharged.

(RANJIT SINGH)
JUDGE

May 22, 2007
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